REDACTED-FOR PUBLIC INSPECTION

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Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington D.C. 20554

Re: Petition of ACS Anchorage, Inc., Pursuant to Section 10 of the Communications Act of 1934, as amended, for Forbearance from Section 251(c)(3) and 252(d)(1) in the Anchorage LEC Study Area, WC Dkt. No. 05-281

Dear Ms. Dortch:

Time Warner Telecom Inc. ("TWTC"), Cbeyond, Inc. and One Communications Corp., by their attorneys, hereby address arguments made by ACS and other issues regarding forbearance from unbundling loop and transport facilities needed to serve businesses in the Anchorage Alaska study area.[1]

As explained more fully below, the Commission must adopt *and consistently apply in its analysis* the appropriate geographic and product markets in this proceeding. This means the following.

- The Commission must adopt areas no larger than individual wire centers as the relevant geographic market.

- In conducting its analysis, the Commission must not arbitrarily and selectively depart from the wire center geographic market approach. For example, the Commission must not rely on network coverage data that is averaged across multiple wire centers, as it did in the *Omaha Order*.

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[1] Following General Communication Inc.'s ("GCI") lead, for the purpose of this letter (and only this letter) we define the "enterprise market" as those customers who, according to GCI, demand "8 or more switched business lines or who require higher capacity lines, such as DS1s, fractional DS1s, and high capacity services." Opposition of GCI, WC Dkt. No. 05-281, at 17 (filed Jan. 9, 2006) ("*GCI Opposition*"). Conversely, "small business" customers in the Anchorage market are, as defined by GCI, those businesses that demand less than 8 switched business lines.

- The Commission must continue to treat the business and residential/mass markets as separate and discrete markets. Indeed, in this proceeding, GCI has offered compelling evidence that there are two business markets in Anchorage, small business and larger enterprise, and the Commission should accept that framework here.

- The Commission must not attempt to rely on GCI's network coverage for all customers, residential/mass market as well as business, as a basis for eliminating UNEs needed to serve solely business customers. That approach is flatly inconsistent with the Commission's repeated recognition, in the *Omaha Order* and elsewhere, that the UNEs needed to service residential/mass market customers are not substitutes for UNEs needed to service the different business markets.

Applying the facts in this case to a wire center geographic market and the appropriate product markets yields the conclusion that no forbearance from unbundling can be justified with regard to loops and transport used to serve either small business or enterprise customers.

- Most importantly, it is clear that there is virtually no actual facilities-based competition in the small business or the enterprise market in Anchorage. GCI, the only facilities-based competitor in the market, has explained that its network only "covers," at the most, **[proprietary begin] [proprietary end]** percent of enterprise locations and **[proprietary begin] [proprietary end]** percent of small business locations in any particular wire center.[2]

- Unlike the Omaha market, the ILEC's main competitor in the Anchorage market, GCI, continues to rely heavily on UNEs to serve business customers. Elimination of UNEs would therefore foreclose the very competition upon which ACS relies in seeking forbearance.

- None of the factors relied upon by the Commission in the *Omaha Order* to "minimize[] the risk of duopoly and of coordinated behavior or other anticompetitive conduct" is present in Anchorage. There is no special access competition in the local market, there are no established competitors in the local market other than GCI, and Section 271 wholesale requirements do not apply.

- Finally, any requirement that ACS continue to offer UNEs free of the constraints of TELRIC pricing is simply an invitation to ACS to engage in price squeezes and other anticompetitive conduct.

[2] References herein to locations that GCI's network "covers" and "passes" have the same meaning as in GCI's filings in this proceeding. That is, GCI's network covers a location if GCI is ready, willing and able to serve the location over its own network facilities. GCI's network "passes" a location if the location is within 80 feet of GCI's network. As discussed below, GCI's network passes many customer locations that it does not cover.

I. A Geographic Market No Larger Than A Wire Center Is Appropriate For Analyzing A Petition For Forbearance From Loop And Transport Unbundling

In both the *TRRO* and the *Omaha Order*, the FCC explained that the wire center is the most appropriate geographic market for determining where unbundling should be retained.[3] In the *TRRO*, the FCC rejected an MSA-wide impairment analysis proffered by several ILECs as too broad.[4] The FCC reiterated this finding in the *Omaha Order*, holding that "[u]sing such a broad geographic region would not allow us to determine precisely where facilities-based competition exists." *Omaha Order* n.186.[5]

An analysis on a wire center (or more granular) basis is appropriate for two fundamental reasons. To begin with, loop facilities deployment varies widely depending upon the revenue available in a particular location and the cost of loop construction (determined in significant part by the distance of the customer from the carrier's existing transport network). *See, e.g., TRRO* ¶ 149. Indeed, the GAO just last week reached precisely this conclusion.[6] The laws of loop construction economics apply in Anchorage just as they do elsewhere. For example, it is only economically rational for GCI to extend either its Hybrid Fiber Coax (HFC) network (which is incapable of providing enterprise services in any case) or its fiber network to properties within 80 feet of its existing cable plant.[7] Beyond 80 feet, "regardless of the available technology, [GCI] cannot serve those businesses [with its

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[3] *See Unbundled Access to Network Element; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶¶ 155-156 (2005) ("*TRRO*"); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, n.129 ("*Omaha Order*").

[4] With respect to loops, in rejecting the ILECs' proposal for an MSA-wide test (*see TRRO* n.435), the FCC held that "a single MSA can encompass urban, suburban and rural areas, each of which presents different challenges to competitive LECs seeking to self-deploy high-capacity loop facilities… An impairment determination that applies to a geographic zone of this size is therefore likely to over-estimate or under-estimate impairment." *TRRO* ¶ 164.

[5] TWTC has appealed the *Omaha Order*, and that appeal is pending before the D.C. Circuit Court of Appeals. Unfortunately, as TWTC explained in its reply brief in the appeal (as well as below), the FCC failed to consistently apply a wire center geographic market in the *Omaha Order*. *See* Reply Brief of CLEC Petitioners at 3-5, *Qwest v. FCC* (D.C. Cir. 2006) (No. 05-1450). Nevertheless, the FCC correctly stated in its order that the UNE forbearance *should* be analyzed on a wire-center basis. ,

[6] U.S GOV'T ACCOUNTABILITY OFFICE, GAO Rept. No. 07-80, FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES 26 (2006).

[7] *See* Declaration of Alan Mitchell ("*Mitchell Decl.*"), attached to *Ex Parte* Letter of John T. Nakahata *et al.*, Counsel, GCI, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281, Ex. D, ¶ 3 (July 3, 2006) ("*GCI July 3 Ex Parte*").

cable plant] in a commercially reasonable time."[8] Intractable entry barriers therefore preclude the inference that competition in one location means that competition in a nearby location is possible. Thus, a highly granular assessment of GCI's network "coverage" is required.

In an attempt to counter GCI's assertion that it has only a limited ability to extend its network to serve new customers, ACS asserts that GCI could deploy facilities to locations within 400 feet of its network.[9] But this proves too much. Even if ACS is correct, its analysis would still mandate the use of a geographic market that is far more granular that a study area.

A geographic market no larger than a wire center is also appropriate in this case because regulators have granted ACS the freedom to price discriminate on a customer-by-customer basis. For example, the Regulatory Commission of Alaska ("RCA") regulations leave ACS free to provide "special contract" *retail* pricing for DS0 tariffed services and DS1 and DS3 special access services at variance from the prevailing tariff rate.[10] As GCI declarant Nanette Thompson has stated, Section 53.243 of the Alaska Administrative Code ("AAC") permits carriers to offer special contracts merely by "posting information on the carrier's website and making an informational filing at the RCA."[11] It is unclear whether competitors would even know the price that ACS has offered to its retail customers.[12] Even absent these special contracts, the tariffs themselves permit ACS to offer annual discounts of "$150 per line per year" to individual customers.[13] ACS has admitted that its current contracts with businesses permit it to meet the competition's pricing on a case-by-case basis.[14]

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[8] *GCI July 3 Ex Parte* at 11.

[9] *See* Statement of Howard A. Shelanski, attached to *Ex Parte* Letter of Karen Brinkmann *et al.*, Counsel, ACS, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281, WC Dkt. No. 05-281, Ex. E, ¶ 3 (Sept. 8, 2006).

[10] Section 53.243(a) specifically excludes those services listed in Section 52.220(c) from the deregulatory provisions of Section 53.243, including streamlined filing provisions for special contracts. *See* 3 AAC § 53.243(a). One of the services listed under Section 53.220(c)(4) is "interexchange carrier access services, including special access." 3 AAC § 53.220(c)(4). Conversations with RCA staff have indicated that this exclusion was only meant to apply to special access when it is used as the terminating or originating portion of a interexchange circuit, not as an input to a local exchange broadband transmission service.

[11] Declaration of Nanette Thompson ¶ 12, attached to GCI July 3 *Ex Parte*, at Ex B.

[12] Although ACS is required to file a copy of the special access contract with the commission, Section 48.045 specifically permits a carrier to request confidential treatment. *See* 3 AAC § 48.045.

[13] *See* GCI July 3 *Ex Parte* at 12.

[14] *See* Declaration of Mitchell A. Coon, attached to *ACS Petition for Forbearance*, WC Dkt. No. 06-109, Ex. F, ¶ 3 (May 22, 2006) ("Currently, Both GCI and ACS operate under customer contracts with the guaranteed value concept. Because both companies filed a tariff to cover this promotion, all contracts with business customers include the Guarantee Value Concept….As such, each company

Although there are limits on the magnitude of price increases that may be imposed on "residential or single-line business basic line charges," 3 AAC § 53.243(c)(1), this limitation does not apply to the multiple-line services demanded by a typical business customer. These regulatory provisions effectively give ACS complete pricing flexibility in the provision of services demanded by small business and enterprise customers.

Nor are there meaningful restrictions on ACS' pricing flexibility in the market for *wholesale* transmission facilities needed by competitors to serve enterprise customers (i.e., special access) and small business customers. The section of Alaska's rules that addresses wholesale services merely indicates that "a local exchange carrier shall offer its service for resale to other carriers consistent with 47 U.S.C. 251 and 252…" 3 AAC § 53.250. At most, this provision requires that carriers offer their resale rates at an avoided cost discount. Importantly, however, the FCC has held that exchange access, of which special access is a subset, is *not* subject to the resale pricing requirements of Section 251(c)(4).[15]

Given that ACS has almost complete discretion to discriminate in pricing its wholesale and retail services, the risk of aggressive price discrimination in the absence of UNEs is high. Indeed, as GCI argues in detail, ACS has been unwilling to provide wholesale telecommunications services on just and reasonable terms in the absence of regulation or the threat of regulation.[16] In those areas (if there are any) within wire centers where ACS faces substantial facilities based competition from GCI, ACS will set its prices low to meet competition. In those areas where ACS remains the only source of end-user connections to businesses, ACS has the incentive to maintain high retail rates and even higher wholesale rates to create a classic price squeeze against GCI.

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must re-price its services when a customer under this type of contract receives a competitive offer, or face losing the customer., who may then accept the better competitive offer without penalty."); Statement of Mark Ezenberger, attached to *ACS Petition for Forbearance*, WC Dkt. No. 06-109, Ex. 6, ¶ 2 (May 22, 2006) ("The competitive environment in Anchorage is such that both GCI and ACS must earn each customer's business every day, repricing its services in order to remain competitive.").

[15] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 873 (1996), *subsequent history omitted* ("Exchange access services are not subject to the resale requirements of section 251(c)(4). The vast majority of purchasers of interstate access services are telecommunications carriers, not end users…end users do occasionally purchase some access services, including special access, Feature Group A, and certain Feature Group D elements for large private networks. Despite this fact, we conclude that the language and intent of section 251 clearly demonstrates that exchange access services should not be considered services an incumbent LEC 'provides at retail to subscribers who are not telecommunications carriers' under section 251(c)(4).").

[16] *See generally*, *Ex Parte* Letter of John T. Nakahata *et a*l., Counsel, GCI, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281 (Sept. 27, 2006).

Moreover, the additional state and federal requirements that rates remain "just and reasonable," (if such a guarantee exists at all at the state level in Alaska)[17] and not unreasonably discriminatory also provide no protection against price discrimination. For years, the FCC subjected ILECs to rate of return regulation, price caps and TELRIC rates for the very reason that a requirement that rates be "just and reasonable" is, by itself, little guarantee against discrimination. It is unrealistic to believe that a state Commission or the FCC can effectively monitor ACS' pricing behavior in the small business and enterprise markets in the absence of a regime that sets explicit boundaries to ACS' wholesale and retail rates. It is clear therefore that ACS would be free to price discriminate on a customer-by-customer (and of course wire center-by-wire center) basis at will within the Anchorage study area if forbearance were inappropriately granted in the business markets. This fact mandates the use of a geographic market that is no larger than individual wire centers.

Finally, if the Commission does utilize a wire center geographic market, it must not, as it did in the *Omaha Order*, fail to consistently apply that geographic market in its analysis. In the *Omaha Order*, the Commission concluded that it was reasonable to eliminate loop and transport UNEs needed to serve the business market based in part on Cox's network coverage for all customers, residential and business, in each wire center. *Omaha Order* ¶ 62. However, recognizing the need for a separate analysis in the enterprise market (discussed more fully below), the Commission also relied on the extent to which Cox's network covered business locations. Unfortunately, the Commission relied on the *average* number of businesses covered by Cox's network in the nine wire centers in which the Commission granted forbearance. *See id.* n.174. In so doing, the Commission inexplicably and incoherently departed from its *single* wire center geographic market test and applied a *nine wire center* geographic market test. Such an approach is inappropriate because the Commission cannot be assured that an average coverage estimate across multiple wire centers does not mask the complete or virtual absence of intermodal network coverage in any individual wire center. The Commission must not make this mistake again in this proceeding. It must examine the extent of intermodal network coverage (and competition more generally) separately for each individual wire center. Any other approach would be arbitrary and capricious and inconsistent with the bedrock policies established in the *TRRO*.

II. The Commission Must, At The Very Least, Treat The Business And Mass Markets As Separate Relevant Markets For Purposes Of Determining Whether Forbearance From Unbundling Obligations Is Appropriate.

Since the early development of local competition after the passage of the 1996 Act, the Commission has repeatedly recognized the need to treat the services demanded by business and mass market customers as separate product markets.[18] The Commission has typically defined "mass

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[17] As GCI indicates, there is no explicit RCA telecommunications regulation stating that rates must be "just and reasonable." *See* Declaration of Nanette Thompson, *supra not*e 10, ¶ 7.

[18] *See Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order in CC Dkt. No. 96-149 and Third Report and Order in CC Dkt. No. 96-61, 12 FCC Rcd. 15756 ¶ 30 (1997).

market" services as those demanded by residential customers only or residential and very small business customers, and it has defined "enterprise" services as those demanded exclusively by business customers. As the FCC held in the *TRRO*, these customer classes differ in the kinds of services they purchase, the service quality they expect, the prices they are willing to pay, the levels of revenue they generate, and the costs of delivering services of desired quality.[19] Accordingly, the Commission has again and again found it necessary to treat services demanded by enterprise and mass market customers as separate markets.[20]

In the *Omaha Order*, the Commission followed this approach and again analyzed the mass and enterprise markets separately. With respect to dominance, the Commission divided its analysis into services demanded by "the mass market (residential consumers and small business customers) and the enterprise market (medium sized and large business customers)." *Omaha Order* ¶ 22. Based on the evidence provided in the record, the Commission granted Qwest's request for non-dominant treatment in the mass market, but rejected the request "with regard to enterprise services due to a lack of serving area-wide information for the Omaha MSA." *Id.* ¶ 50.

Similarly, the Commission assessed the mass/residential and enterprise markets separately for purposes of the unbundling analysis in the *Omaha Order*.[21] For example, the Commission relied on Cox's success in gaining market share in addition to Cox's network coverage as a basis for concluding that forbearance from unbundling mass market loops was appropriate. *See Omaha Order* ¶ 66. The Commission relied on different factors in forbearing from unbundling enterprise loops, including Cox's willingness to market services to enterprise customers, the pace at which Cox's enterprise sales had grown, and Cox's network coverage among business customers in the nine wire centers at issue. *See id.* ¶ 66, n.174. Indeed, the Commission arguably recognized an even more granular set of product markets by separately assessing the extent to which Cox provided DS0, DS1 and DS3 loops in the nine wire centers in question. *See id.* ¶ 69.

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[19] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 123 (2003) *("TRO")*.

[20] *See id.* ¶ 209 (2003) (concluding that the "hybrid-copper-fiber loops" and the "high frequency portion of copper loops" (HFPL) (along with "fiber-to-the-home" (FTTH) and DS0 loops) are "mass market loops" and concluding that DS1, DS3 and OCn loops are "enterprise loops"); *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, ¶¶ 24, 56, 81 (2005); *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, ¶¶ 24, 56, 82 (2005).

[21] ACS has itself recognized that the Commission made this distinction in the *Omaha Order*. *See Ex Parte* Letter of Karen Brinkmann *et al.*, Counsel, ACS, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281, at 9 (Nov. 30, 2006).

In the present proceeding, both ACS and GCI agree that there are *at least* two separate product markets in Anchorage. ACS has conceded the existence of separate mass and enterprise markets.[22] GCI has gone further and "has demonstrated the existence in Anchorage of three separate product markets (residential, small business and enterprise)."[23] Because GCI provided evidence of three product markets, instead of two, the FCC should analyze the Anchorage market using this more granular market definition. *See id.* at 2. At the very least, however, the Commission must analyze the mass market and enterprise markets separately.

In so doing, the Commission must separately assess the extent to which GCI's network covers business as opposed to residential customers in any particular wire center in Anchorage. It is simply not enough to rely on the extent to which GCI's network covers all customer locations (residential and business) in the aggregate in any particular wire center. Combining residential and business coverage would cause the Commission to rely on purportedly widespread network coverage in the residential market as a basis for eliminating enterprise UNEs. But there is no basis for such reliance if, as the Commission has held many times, residential loops are not substitutes for business loops. Separate residential and enterprise market analyses, including separate analysis of the extent of GCI's network coverage in the residential and business markets, is therefore necessary and appropriate.

III. No Anchorage Wire Center Contains Sufficient Facilities-Based Competition To Justify The Elimination The UNE Loops Needed To Serve Business Customers In Anchorage.

When the wire center and separate business product markets are properly applied, it is clear that forbearance must be denied in the business market. The record in this proceeding conclusively shows that there is insufficient facilities-based competition in any Anchorage wire center to justify the elimination of unbundling in the small business and enterprise markets.

GCI is essentially the only facilities-based competitor providing local services to business customers in Anchorage. But GCI cannot serve enterprise customers with its HFC plant. As GCI has repeatedly explained, "existing cable technology does not yet permit GCI to provide reliable or economical large-scale DS1 level services to medium and large business customers."[24] As a result, GCI can only serve enterprise customers in Anchorage with its fiber plant, which is much less extensive than its HFC plant. According to GCI, its fiber network passes no more than **[proprietary begin] [proprietary end]** percent of the enterprise customer locations in any Anchorage wire center. In each of these wire centers, GCI can actually serve **[proprietary begin] [proprietary end]** percent

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[22] *See, e.g., See Ex Parte* Letter of Karen Brinkmann *et al.,* Counsel, ACS, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281, WC Dkt. No. 05-281, at 8 (Sept. 8, 2006).

[23] *Ex Parte* Letter of John T. Nakahata *et al.*, Counsel, GCI, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281, at 1-2 (Nov. 14, 2006) (internal citations omitted)("*GCI Nov. 14 Ex Parte*").

[24] *See* GCI *Nov. 14 Ex Parte* at 9. *See also GCI July 3 Ex Parte* at 26-30; Declaration of Dennis Hardman; attached to *GCI July 3 Ex Parte,* at Ex. G; Declaration of Gene Strid, attached to *GCI July 3 Ex Parte,* at Ex. C.

of the small number of enterprise customers passed by its fiber plant.[25] Thus, in the aggregate, GCI can actually serve no more than **[proprietary begin] [proprietary end]** of all business customer locations (small business and enterprise combined) in *any* wire center.[26] This may even overstate the extent to which GCI can serve businesses in light of building access and right-of-way issues, in addition to the short Anchorage construction season. Clearly, GCI is not "ready, willing and able within a commercially reasonable time" to serve enough business customer locations with its own fiber facilities in the Anchorage market to justify forbearance.

Even in the small business market, where its network covers a larger percentage of customers than is the case with enterprise customers, GCI is not ready, willing and able to serve most customers. Although GCI's HFC network "passes" **[proprietary begin] [proprietary end]** of small business locations in most of the wire centers in Anchorage, GCI can serve only a small fraction **[proprietary begin] [proprietary end]** of these passed businesses even after upgrading its cable plant. This is because building access, right-of-way issues, and lack of many of the features demanded by small business customers (such as **[proprietary begin] [proprietary end]**) preclude GCI from serving the **[proprietary begin] [proprietary end]** of business locations in Anchorage with its upgraded cable facilities.[27] As a result, GCI's HFC network "covers" no more than **[proprietary begin] [proprietary end]** percent of small businesses with its upgraded cable facilities.[28]

ACS has offered no basis for questioning these conclusions. ACS filed maps comparing its Anchorage *fiber network* to GCI's fiber network.[29] At first blush these maps seem to indicate that the scope of GCI's network is similar to ACS's network. But this is simply untrue. ACS, like every other ILEC, has built *copper* to nearly every business in Anchorage over which it can provide DS1 level services to enterprises. GCI relies almost exclusively on fiber (it virtually never uses copper) to serve enterprise customers, and it only deploys fiber to customer locations for which the revenue opportunity justifies the cost of construction. Accordingly, the maps filed by ACS show much of the GCI network capable of serving businesses while omitting large portions of the ACS network capable of serving business customers. The Commission must therefore credit GCI's estimates of its own network coverage and conclude that, even in the small business market, there is insufficient facilities-based competition to justify forbearance.

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[25] GCI's ability to serve enterprise locations with its own fiber differs little from TWTC's. TWTC can only serve approximately 25 percent of its customer locations over its own loop facilities. *See* Time Warner Telecom, Inc., SEC Form 10-Q Quarterly Report for the Period Ended Sept. 30, 2006, at 27 (filed Nov. 9, 2006).

[26] **[proprietary begin] [proprietary end]**

[27] *See* Declaration of Jonathan P. Wolf ¶¶ 5-12, attached to *GCI Nov. 14 Ex Parte*, at Ex. 2.

[28] **[proprietary begin] [proprietary end]**

[29] *See Ex Parte* letter of Elizabeth R. Park, Counsel, ACS, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281, at 2, 6 (Sept. 20, 2006).

IV. There Is No Other Basis For Granting Forbearance From Unbundling Loops Or Transport Needed To Serve Businesses In Anchorage

All other factors relevant to the forbearance analysis weigh heavily against forbearing from unbundling requirements in the Anchorage business markets. *First*, by any measure, GCI is heavily reliant on UNE loops to serve business customers in Anchorage. ACS states that, in the enterprise market, GCI purchases **[proprietary begin] [proprietary end]** DS-1 UNE loops.[30] Based on data submitted by GCI, it appears that GCI has deployed enterprise loops with the equivalent of **[proprietary begin] [proprietary end]** DS-1 circuits of capacity in Anchorage.[31] It is likely that many of the these loop facilities transmit multiple DS-1s to a single location. As a result, the number of locations served by GCI's own loops transmitting one or more DS-1s is likely substantially smaller than **[proprietary begin] [proprietary end]**. Accordingly, GCI likely relies on DS1 UNEs to serve at least as many locations as it serves with enterprise loops it has deployed. Similarly, GCI remains heavily reliant on UNEs to serve the small business market. GCI provides service to **[proprietary begin] [proprietary end]** DS0 equivalents to businesses over UNE-L while providing service to **[proprietary begin] [proprietary end]** DS0s to businesses over its upgraded cable facilities.

GCI's reliance on UNEs to serve the enterprise and small business market in Anchorage is likely to continue for quite some time. GCI has recently indicated that facilities deployment in the Anchorage market is taking longer than expected.[32] According to GCI CEO Ron Duncan, it will take several years to completely eliminate GCI's reliance on "commercial loop[]" UNEs.[33] Clearly, despite GCI's intention to rely on its own facilities wherever possible, it has no choice but to rely on UNEs in large portions of the Anchorage study area.

Thus, unlike Omaha, where Cox did "not itself rely on UNEs to compete" (*Omaha Order* n. 186), a very large portion of the competition in the business market in Anchorage is offered via UNEs. If the Commission were to forbear from requiring ACS to continue to offer such UNEs, competition in the business market would disappear in many, many locations. This is obviously inconsistent with the Section 10 requirement that forbearance be granted where continued regulation is no longer necessary

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[30] *See* Letter from Karen Brinkmann *et al*., Counsel, ACS, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281, Attach. 1 at 2 (Nov. 1, 2006).

[31] This number is the sum of the approximately **[proprietary begin] [proprietary end]** used to provide switched and combined switched and non-switched services (assuming 22.6 DS0 equivalents per DS-1), and the **[proprietary begin][proprietary end]** used to provide non-switched DS-1s. *See Ex Parte* letter of Brita D. Strandberg, Counsel, GCI, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281, at Ex. VI (Oct. 24, 2006); *Ex Parte* letter (Erratum) of John T. Nakahata *et al*., Counsel, GCI, to Marlene H. Dortch, Secretary, WC Dkt. No. 05-281, at Ex. VIIA (Nov. 7, 2006).

[32] *See generally*, *Ex Parte* Letter of John T. Nakahata *et al*., Counsel, GCI, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-281 (Nov. 7, 2006).

[33] *See* GCI Q3 2006 Earnings Conference Call Transcript at 5.

to ensure that rates are just and reasonable and no longer necessary to protect consumers. *See* 47 U.S.C. 160(a)(1), (2).

Second, even if GCI's network covered a much larger percentage of business customers in Anchorage, the elimination of UNEs needed to serve the business markets would result in a duopoly. The Commission has recognized that competition from a single intermodal competitor is insufficient basis for forbearing from loop and transport UNEs. Accordingly, in the *Omaha Order*, the Commission relied on a number of indicators that competition from competitors other than Cox would "minimize[] the risk of duopoly and of coordinated behavior or other anticompetitive conduct." *See Omaha Order* ¶ 68. None of those factors is present here.

For example, in the *Omaha Order*, the Commission relied on its finding that a "number of carriers have had success competing for enterprise services using DS1 and DS3 special access channel terminations obtained from Qwest" as a basis for concluding the Cox would not be the only competitor left after UNE forbearance. *Id.*[34] But no competitors rely on special access to compete in the provision of local services to business customers in Anchorage. In a recent *ex parte*, ACS indicated that GCI is currently purchasing **[proprietary begin] [proprietary end]** intrastate or interstate special access circuits and those **[proprietary begin] [proprietary end]** circuits that GCI does purchase are used as an input for interexchange service. ACS therefore admitted that "it is unlikely that GCI is using special access in the Anchorage study area as a substitute for UNEs on a significant scale."[35] AT&T is the only other wireline carrier purchasing special access from ACS, but ACS provides no indication that AT&T is using special access to provide local service. *Id.*[36]

In the *Omaha Order*, the Commission also relied on the presence of "actual and potential competition from established competitors" in the enterprise market. *See Omaha Order* ¶ 71. For example, the Commission took comfort from the fact that AT&T (*see id.* ¶ 100) and McLeod, "an established…carrier[] of significant size" (*see id.* ¶ 38) competed in the provision of local exchange services to businesses in Omaha. No such established competitors exist in Anchorage other than GCI. AT&T is the only carrier in Anchorage serving the local market other than GCI and ACS, and AT&T has a paltry 3 percent market share.[37]

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[34] As Time Warner Telecom has explained in its appeal of the *Omaha Order* and as discussed further below, these conclusions are flatly inconsistent with the Commission's conclusion in the *TRRO* that special access is not a substitute for UNEs in the local market. *See TWTC Br.* 20-27.

[35] ACS *Ex Parte*, WC Dkt. No. 05-281, at 3 (Oct. 13, 2006).

[36] It would be unsurprising if competitors in Anchorage are using special access primarily as an input for interexchange service; in the *TRRO*, the FCC found that most carriers were using special access as an input for interexchange and wireless service. *See TRRO* ¶ 64.

[37] *See* Statement of David C. Blessing, attached to *ACS Petition for Forbearance*, WC Dkt. No. 05-281, Ex. E at 4 (Sept. 30, 2005).

The Commission also relied on the continued requirement that Qwest offer Section 271 UNEs in the *Omaha Order*. *See id.* ¶ 71. Of course ACS is not subject to the requirements of Section 271. *See* 47 U.S.C. 271 (applicable only to the BOCs). Accordingly, the Commission cannot rely on Section 271 requirements as the basis for forbearance in this proceeding.

But it is also important emphasize that, even if ACS were subject to unbundling requirements that resemble those in Section 271, the Commission could not rely on this fact as a basis for eliminating UNEs. For example, it has been suggested that the Commission could forbear from TELRIC pricing requirements applicable to loops needed to provide local services to businesses in Anchorage while retaining the requirement that ACS unbundle loops needed for this purpose.[38] In this case, the price for the UNEs in question would presumably be set at "commercially reasonable" rates, possibly with a default price set at some percentage higher than those applicable under a TELRIC methodology.

Relying on such a condition as the basis for unbundling loops and transport needed to provide local service to business customers would unlawfully violate several bedrock Commission rulings. To begin with, the Commission has held that eliminating UNEs priced at TELRIC in favor of loops and transport priced significantly above TELRIC creates a "grave risk" of ILEC price squeezes. *TRRO* ¶ 59. Especially where, as in Anchorage, the ILEC possesses substantial pricing flexibility, eliminating TELRIC gives the ILEC a "substantial incentive to raise prices to levels close to or equal to the associated retail rate, creating a 'price squeeze' and foreclosing competition" from those relying on loops and transport priced above TELRIC. The Commission found this problem to be "sufficient as an independent reason" to conclude the above-TELRIC loops and transport are not a substitute for UNEs in the local market. *See id.* at n.161.

Nor would it be sufficient if GCI were able to rely on the above-TELRIC prices contemplated by the suggested approach at issue. In the *TRRO*, the Commission explained that the impairment standard requires unbundling where a lack of access to a UNE would pose an entry barrier to a "hypothetical competitor acting reasonably efficiently." *Id.* at ¶ 26. In assessing competition under this test, the Commission stated that it "do[es] not presume that a hypothetical entrant possesses any particular assets, legal entitlements or opportunities, *even if a specific competitive carrier in fact enjoys such advantages as a result of its unique circumstances*." *Id.* (emphasis added). Accordingly, the Commission "reject[ed] the arguments of some parties that *just because one competitive LEC holds a particular set of assets*, 'by extension, any efficient [including LEC]' must be deemed to hold those assets." *Id.* at n.77 (emphasis added).

Moreover, the Commission has explained that cable competitors such as GCI are the prototypical example of a competitor that has competitive advantages "as a result of its unique circumstances." In the *TRO*, for example, the Commission explained that "cable operators have been able to overlay additional capabilities onto networks that they built for other purposes, often under government franchise, and therefore have first-mover advantages and scope economies not available to

[38] *See Ex Parte* Letter from Christopher P. Nierman, Counsel, GCI, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281, at 5 (Oct. 5, 2006).

other new entrants, which lower their incremental costs of providing the additional services." *See TRO* ¶ 98. Based on these unique advantages, the Commission indicated that it would give competitive entry by such entities less probative weight than entry by others, especially where the cable operator does not offer its transmission services at wholesale to other competitors. *See id.*

Like other cable operators, GCI possesses unique advantages, such as economies of scope, first mover advantages, and so on. Because of its "unique circumstances," it may be that GCI can compete with ACS in the business market even if it must pay input loop prices that are significantly above TELRIC. For example, GCI may be able to offset such higher loop costs with uniquely low transport costs yielded by the joint transmission of voice, video and data traffic. Similarly, GCI may be able to make up for some of its higher loop costs by charging ACS higher backhaul transport rates on routes for which ACS must rely on GCI circuits.[39] But the Commission's explanations of the impairment standard in the *TRRO* and the *TRO* make clear that GCI's ability to rely on UNEs priced above TELRIC because of its "unique circumstances" is not dispositive of the impairment and unbundling analysis. Even if GCI could compete using above-TELRIC rates as the result of its "unique circumstances," there is simply no reason to believe that any competitor other than GCI could do so. The Commission must therefore reject this approach as a means of ensuring that the pro-competition goals of the Communications Act are realized in Anchorage.

V. **Conclusion**

For the reasons discussed above, ACS' petition for forbearance should be denied with regard to loops and transport needed to serve the small business and enterprise markets.

Sincerely,

________/s/ Thomas Jones________

Thomas Jones
Jonathan Lechter

cc: Michelle Carey
Scott Bergmann
Scott Deutchman
Ian Dillner
Tom Navin

[39] *See* Letter from Karen Brinkmann *et al.*, Counsel, ACS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-281, at 3 (Oct. 27, 2006).